No. 659

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In the Supreme Court of the United States

OCTOBER TERM, 1943

DE FREMERY & CO., *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Customs and Patent Appeals

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Above-named petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Customs and Patent Appeals, affirming in part a judgment of the United States Customs Court.

OPINIONS BELOW

The opinions of the trial court are reported as CD 455, 6 USCCR 167, and CD 587, 8 USCCR 113. The opinion of the Court of Customs and Patent Appeals (R 39) is reported as CAD 253, 31 CCPA (Customs) ....., 138 F2d 161.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered June 10, 1943 (R 53-4), and on October 4, 1943, petitioner's application for rehearing was denied (R 55). The jurisdiction of this court is invoked under section 195 of the Judicial Code, as amended, 28 USC 308. On December 29, 1943, by order of the Chief Justice the time during which the petition might be filed was extended to February 3, 1944 (R 56).

QUESTIONS PRESENTED

The primary question is whether various types of alcoholic beverages were upon importation taxable under a provision for "distilled spirits . . . imported into the United States," against the contention of petitioner that they are not "distilled spirits."

This question depends in turn upon whether a definition of "distilled spirits" which, when originally enacted as a part of section 4, Act of July 20, 1868, 15 Stat. 126, related only to domestic distillery products, should, by virtue of its subsequent enactment as RS 3248, be applied to imported products. Thus, in brief, the question is whether codification without material change imparts to a statute a broader scope than originally it possessed.

Petitioner seeks review of the judgment below upon the ground that this question was therein erroneously answered in the affirmative.

STATUTES INVOLVED

The pertinent statutes appear in full in the petition and supporting brief upon the pages indicated below. They are as follows:

Act of July 20, 1868, sec. 4, c. 186, 15 Stat. 126....pp. 4-5

Revised Statutes of 1874, sec. 3248.....pp. 4, 14

Revised Statutes of 1874, sec. 3254.....p. 23

Revised Statutes of 1874, sec. 3282.....pp. 4-5

Revenue Act of 1918, sec. 600 (40 Stat. 1105), as amended by sec. 2, Liquor Taxing Act of 1934 (48 Stat. 316) and as codified in sec. 1150 (a) (1), title 26, 1934 Code.....p. 14

STATEMENT

In 1937 petitioner imported the three beverages referred to below, which had these alcoholic contents (R 42, 45): Creme de cassis, 15 percent; green menthe, 30 percent; cherry cordial, 32 percent. These articles had been produced by processes of infusion or distillation, were classified for customs purposes under the Tariff Act of 1930 as "cordials", and assessed with the appropriate duty for such articles. They were also assessed with the tax now in controversy under section 600 (a), Revenue Act of 1918, as amended by section 2, Liquor Taxing Act of 1934, as "distilled spirits." After appropriate proceedings instituted by a protest against the collector's assessment (R 5, 9), it was held in the decision below (1) that the creme de cassis was not, for tariff purposes, dutiable as a "cordial"

but rather as "fruit juices and fruit sirups . . . containing . . . . alcohol"; also (2) that, by virtue of a definition of "distilled spirits" found in RS 3248, each of these three articles was taxable under the revenue act as "distilled spirits." Consequently, according to the decision below imported rectified products, to wit, alcoholic fruit juices and alcoholic cordials, are taxable as distilled spirits.

The provisions of RS 3248 are now found in sections 2809 (b) (1) and 2800 (c), 26 USC; and in the 1934 edition of the Code, referred to in the opinion below (R 46-7), those provisions appear as sections 1158 (b) (1) and 1150 (6) (c), title 26. This law was originally enacted as a part of section 4, Act of July 20, 1868, 15 Stat. 126, and remained unchanged until incorporated in the Revised Statutes of 1874, at which time the portion appearing below in italics became RS 3248, and the remainder became RS 3282:

> Sec. 4. And be it further enacted, that *distilled spirits, spirits, alcohol, and alcoholic spirits within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirits, or be immediately, or at any other time, transferred into any other substance, either in the process of original production or by any other process;* and no mash, wort, or wash fit for distillation or the production

of spirits or alcohol shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol, or any vapor of alcoholic spirits, in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and the tax thereon paid. Every person who violates any provision of this section shall be fined for each offense not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years: Provided further, that nothing in this section shall be construed to apply to fermented liquors, or to fermented liquids used for the manufacture of vinegar exclusively. But nothing herein contained shall be construed to authorize the distillation of such fermented liquids, except in an authorized distillery.

RULINGS OF COURT BELOW

The court below held (R 49) that:

> . . . The last part of RS 3248, when first enacted in said Act of July 20, 1868, clearly indicates that the language thereof applied only to domestic spirits. In other words, the language "and the tax shall attach

> to this substance as soon as it is in existence as such . . .'' clearly shows that Congress at that time had in mind domestic liquors.

Nevertheless, it was concluded (R 49) that:

> . . . RS 3248, when imported into the act, was intended by Congress to define ''distilled spirits, spirits, alcohol, and alcoholic spirits'' wherever such terms appeared in the act. Such is clear from the language of said section reading ''within the true intent and meaning of this act,'' *referring* to the act as a whole, i. e., *to all the Revised Statutes.*

Therefore, regardless of the fact that RS 3248, when first enacted as a part of section 4 of the Act of 1868, ''clearly . . . applied only to domestic spirits'' (R 49), and notwithstanding that the entire Act of 1868 ''had no relation whatever to *imported* distilled spirits'' (R 49), nevertheless it was the court's opinion that by virtue of its incorporation into the Revised Statutes as RS 3248, the definition in the Act of 1868 acquired a broader scope, i.e., it became applicable to *foreign* spirits. As to this the court said (R 49):

> . . . For example, for customs purposes (import duty) it (RS 3248) defined ''spirits'' when used in a phrase like ''Brandy and . . . other spirits manufactured or distilled from grain,'' etc. See R. S. 2504, schedule D.

Consequently the court concluded as to the scope of RS 3248 (R 49):

> It is our view that when Congress enacted RS 3248, it was then intended to affect those things mentioned

> in that act (the Revised Statutes) or other articles to which it might later apply. The section remained unrepealed throughout the years. It afforded a proper definition of distilled spirits, whether imported or domestic. The mere fact that the latter portion of the provision has to do only with domestic liquors does not change the situation with regard to the first portion thereof. The definition in the first part of the section is complete, and it is our view that when Congress enacted the revenue acts above referred to [acts of 1917 and 1918], levying an internal revenue tax on *imported* distilled spirits, as well as domestic spirits, it had in mind the applicability of the definition in RS 3248, which was unrepealed and in full force and effect.

The court then determined the issue by a specific and exclusive reliance upon RS 3248, as follows (R 50):

> It is clear to us that all three of the imported articles, containing alcohol as they do, fall within the term "including all dilutions and mixtures of this substance." Certainly alcohol has been mixed with other substances to make the imported products.

REASON FOR GRANTING THE PETITION

It is submitted that the decision below should be reviewed because it decided an important question of federal law, i. e., the taxable status of imported products containing alcohol, in a way which conflicts with principles of statutory construction which have been settled by decisions of this court. In particular it is asserted that the court failed:

1) To consider RS 3248 and RS 3282 (sec. 4, act of July 20, 1868) as one law, as originally enacted in 1868.

2) To construe that portion of RS 3248 which is now pertinent in harmony with the remainder and with the context.

3) To observe and apply Congressional intent as originally manifested in the act of 1868.

Also, petitioner contends that the court erred by affirmatively holding that:

4) The words "this act," as found in RS 3248, referred to the act of 1874 rather than that of 1868, and therefore defined "spirits" wherever that word appeared in said act of 1874.

The court's position in respect to point 1 is contrary to the principle of *Buck Stove Co. v. Bickers,* 226 US 205, holding that separation in the Revised Statutes of several parts of an existing statute did not change that statute's meaning. Likewise, *Anderson v. Pacific Coast Steamship Co.,* 225 US 187, held that an intention to alter the scope and purpose of an existing law cannot be imputed to Congress because in the Revised Statutes it placed in two separate sections portions of what was a single section of the original act.

As to points 2 and 3 it may be observed that as found by the court (R 49) the act of 1868 "had no relation whatever to imported distilled spirits," and that the last part of RS 3248 "when first enacted in 1868 . . . clearly shows that at that time Congress had in mind domestic

liquors." Consequently the application of RS 3248 to foreign products was in disregard of Congressional intent and contrary to the decision in *McDermott v. Wisconsin,* 228 US 115, 128, that an act must be considered and construed "in the light of the purpose and of the power exerted in its passage by Congress."

Also, the court's separation of RS 3248 into two parts, i. e., the definition and the "latter portion," and the court's application of the definition to a subject which it found was not within the purview of the balance of the section, and which clearly was not within the purview of the original law was not only in conflict with decisions cited above under point 1, but also in conflict with those cited below under point 4 holding that a revised statute is to be construed in accordance with the intent of Congress at the time of its original enactment.

Furthermore, the decision is contrary in principle to *Thompson v. US,* 142 US 471, involving a question of whether distilled spirits lost by evaporation were subject to internal-revenue tax. There this court, in considering several pertinent statutes and statutes *in pari materia,* including RS 3248, now under consideration, quoted that statute in the following manner, thus evidencing its understanding that the section not only relates to products of domestic distilleries, but also that it should be construed in its entirety (p. 474, italics quoted):

> . . . By revised Statute 3248, distilled spirits are defined to be "that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses or sugar, etc. . . . *and the tax shall*

attach to this substance as soon as it is in existence as such.''

As to point 4, namely, that the words "this act" as found in RS 3248 meant the act of 1874 and therefore defined the "distilled spirits" wherever that term was used in the Revised Statutes, the decision is clearly contrary to the principle that a revised statute is to be construed in accordance with the intent of Congress at the time of its original enactment. *Doyle v. US,* 94 US 50; *US v. Averill,* 130 US 335; *Page v. Burnstone,* 102 US 664; *US v. Phelps,* 107 US 320; *Crenshaw v. US,* 139 US 99, and *US v. Bathgate,* 246 US 220. See also 11 Encyc. Sup. Ct. Rep. 155, stating in part:

> Where there is no change in phraseology . . . the Revised Statutes are to be construed as having the same meaning as the original act, although the act has been repealed, and are to be construed in the light of history and circumstances existing at the time of enactment of the act, and the judicial and practical construction placed thereon.

Therefore, as it is manifest that section 4 of the Act of 1868 did not define distilled spirits for any purpose other than in connection with that act, and, in this regard, as shown by the annexed brief, extended only to domestic distillery products, it follows that the decision below, being predicated upon an erroneous construction of RS 3248, is erroneous.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

San Francisco, January 27, 1944.

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Brief in Support of Petition for Writ of Certiorari

I) STATEMENT OF ISSUES

The commodities herein involved, as set forth in the opinion below, consist of these three articles:

a) Creme de cassis made by placing black currants in wine alcohol for 50 or 60 days and mixing the resultant juice with sugar (R 42). It contains 43 percent of sugar by weight and 15 percent of alcohol by volume, or about 12 percent by weight. The remaining 45 percent by weight would assumably be composed of currant juice, with some water. It was (R 42):

> . . . admittedly not consumed in the condition imported, but used chiefly for making cocktails and as flavoring for drinks, . . .

For tariff purposes it was held by the court below (R 44) to be dutiable under a provision for alcoholic "fruit juices and fruit sirups," rather than under a provision for "cordials," as held by the collector of customs.

b) Green menthe made by distilling wine alcohol and mint plants together, then mixing the "second run" thereof with sugar sirup (R 45). It contains 37 percent of sugar by weight, and 30 percent of alcohol by volume, or about 24 percent by weight. The remaining 39 percent by weight would assumably consist of water and flavoring substances. Petitioner did not contest the tariff classification of this article under a provision for "cordials."

c) Cherry cordial made by placing fresh cherries in alcohol for 60 days and mixing the resultant juice with

wine alcohol and sugar sirup (R 45). It contains 25.5 percent of sugar by weight, and 32 percent of alcohol by volume, or about 24 percent by weight. The remaining 50.5 percent by weight would assumably consist largely of cherry juice, with some water and flavoring substances. The tariff classification of this article under a provision for "cordials" was likewise not contested by petitioner.

Above-stated percentages by weight of sugar and alcohol do not appear directly in the record, but are based on well-known scientific formulas as applied to data contained in the evidence and mentioned in the opinion below (R 42, 45). It should be noted that in each instance sugar preponderates over alcohol.

Because products of this character consist of spirits and other substances they are not "distilled spirits" within the common meaning of that term. See *Wing Yee Chong v. US*, *Shun Yuen Hing v. US*, and *Brown v. US*, 11 CCA 329, 331, 402; *Rosenbloom v. US*, 13 CCA 63, and *Los Angeles Trading Co. v. US*, 13 CCA 330. See also "spirits" as defined in Standard Dictionary, Century Dictionary, Webster's International Dictionary, and Encyclopedia Britannica. In addition, see *Batjer v. US*, 11 CCA 60, wherein it was said in regard to pertinent legislation (pp. 60, 61):

> For more than 75 years spirits distilled from grain and other materials and cordials have been differentiated by Congress and have been provided for in numerous tariff acts as separate and distinct entities . . . In the absence of any manifest legislative intent to the contrary we must conclude, and in fact the government admits, that the distinction between

> cordials and distilled spirits still continues and that the latter designation does not include the former . . . From this it follows that the cordials under consideration are not classifiable as distilled spirits. . . .

Despite this well-recognized distinction, the involved products were assessed with tax as "distilled spirits" under section 600 (a), Revenue Act of 1918 as amended by the Liquor Taxing Act of 1934, which, as codified in 1934, read:

> Section 1150. Tax. (a) Rate (1) Distilled spirits generally. On and after January 12, 1934 there shall be levied and collected on all *distilled spirits* produced in or *imported* into the United States an internal revenue tax of $2 on each proof gallon or wine gallon when below proof . . . to be paid by the distiller or importer when withdrawn from bond.

The court below upheld this assessment by finding that the merchandise contained alcohol and therefore came within the phrase "including all dilutions and mixtures of this substance," in RS 3248, which reads as follows:

> That distilled spirits, spirits, alcohol, and alcoholic spirits, within the true intent and meaning of *this act*, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, *including all dilutions and mixtures of this substance*, and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirits, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

II) ARGUMENT

a) *Scope of RS 3248:* Petitioner contends that this definition does not bring within the term "distilled spirits," as found in the taxing statute, any dilution or mixture other than a dilution or mixture occurring in the process of distillation when carried on in this country; in other words, that the mixing of spirits with other products, *after distillation has been completed,* does not create a dilution or mixture of the kind referred to in RS 3248.

This contention finds support, so far as domestic products are concerned (such as cordials, medicines, etc., containing alcohol) from the fact that such products have never been subjected to internal taxation as "distilled spirits." Rather, the alcohol *when originally produced* has been so taxed, and then, if the post-distillation product was a beverage, it was separately taxed as a rectified product or taxed *eo nomine* as a cordial. For example see 12 Internal Revenue Record 205 of November 23, 1870, wherein the Commissioner of Internal Revenue held that cordials produced by a process of *mixing* material with distilled spirits were taxable as rectified products and not as distilled spirits. To the same effect see the ruling of November 17, 1869, 10 IRR 169, relating to cordials, anisette and bitters, and 10 IRR 65, relating to bitters.

Also, see IRTD 20498, January 4, 1899, holding that manufacturers of cordials containing large amounts of alcohol and sugar are subject to tax as rectifiers; IRTD 33, February 3, 1900, holding creme de menthe to be a compound of distilled spirits with other materials, and the

producer to be a rectifier; and IRTD 4616, November 23, 1936, holding cordials prepared with distilled spirits and not containing fortified wine to be subject to the rectification tax of 30 cents per proof gallon.

Additional support for petitioner's contention as to the scope of RS 3248 is found in the fact that section 4 of the Act of July 20, 1868 (supra, p. 4), from which RS 3248 was taken, clearly related only to products of a distillery and to "dilutions and mixtures" occurring during distillation. This is established by the injunction therein that "the tax shall attach to this substance *as soon as it is in existence* as such," and by the fact that the latter portion of the section prohibits any person from using "spirits or alcohol . . . in manufacturing . . . any . . . article . . . unless the spirits or alcohol . . . have been . . . tax paid." See also IRTD 2387 of Oct. 20, 1916, stating that spirits used in the manufacture of cordials must first be tax paid.

Therefore, as the law specified that "the tax shall attach to this substance (ethyl alcohol . . . including all dilutions and mixtures) as soon as it is in existence as such," it is obvious that a domestic cordial is not a "mixture" such as is referred to in RS 3248.

In order to present this subject thoroughly it would be necessary to refer to many rulings and decisions preceding passage of the act of 1868 which, when considered in conjunction with the terms of the act and in conjunction with the several rulings and decisions immediately thereafter, clearly show that the purpose of said section 4 extended only to taxation of domestic distillery products; also, that

this purpose was recognized and applied in administration of the law. However, such a presentation would so enlarge this brief as to result in probable infraction of the court's rule as to conciseness. Therefore it will only be said that the history of RS 3248, including the period of time when it was section 4 of the Act of July 20, 1868, shows that it has not been regarded by those entrusted with its administration as a definition applicable to domestic post-distillation "dilutions or mixtures." In brief, products of distillation, whether alcohol or dilutions and mixtures containing alcohol, have been taxed as "distilled spirits," and other alcoholic "mixtures" have not been so taxed.

In consideration of the above premise and the premise that the law in question (section 4, Act of July 20, 1868) was, as held below (R 49), enacted in regard to domestic products, question arises as to whether somehow, by codification in 1874, it attained a broader scope.

The court's conclusion in this regard is clearly contrary to the cases already referred to in the petition, and therefore will not be further discussed. Consequently, there remains for consideration the question of whether in 1917, when imported distilled spirits were taxed for the first time (sec. 300, Revenue Act of 1917), in 1919 when that tax was continued (sec. 600, Revenue Act of 1918), and in 1934, when Congress amended the 1919 act (sec. 1, Liquor Taxing Act of 1934), the purpose was to require assessment, *by virtue of RS 3248*, of the distilled-spirits tax on articles which contained distilled spirits but were not in fact a distilled spirit.

b) *Congressional intent as to the import tax on "distilled spirits":* As to this point the court below held (R 50):

> . . . The definition in the first part of the section is complete, and it is our view that when Congress enacted the revenue acts above referred to, levying an internal revenue tax on *imported* distilled spirits, as well as domestic distilled spirits, it had in mind the applicability of the definition in RS 3248, which was unrepealed and in full force and effect.

Also (R 51):

> . . . Our holding is based upon the proposition that Congress, RS 3248 being in full force and effect *when it enacted the internal revenue tax provision here in controversy, intended* that the new law be read in the light of the definition then in full force and effect.

Stated differently, the court found, without any supporting statutory implication, that in 1917, 1919 and 1934 Congress *intended* to broaden the existing purpose and meaning of RS 3248.

This holding conflicts with *Panama Railroad v. Johnson,* 264 US 375, 385, stating that where existing legislation has been revised and restated in a comprehensive statute (as here by the Revised Statutes), "subsequent enactments touching on that subject are to be construed and applied in harmony with the general statute, save as they clearly manifest a different purpose." See also *US v. Jefferson Elec. Mfg. Co.,* 291 US 386, 396, and *US v. Barnes,* 222 US 513, 520, to the same effect. Furthermore,

such a conclusion as to congressional intent should be manifest from the act in question or its history, and for reasons stated below this is particularly true as to the enactment of the Liquor Taxing Act of 1934.

Prior to enactment of that act it had been specifically held in *Batjer v. US*, 11 CCA 60, 62, that the designation "distilled spirits" did not include imported alcoholic cordials. Also, in *Wing Yee Chong v. US*, *Shun Yuen Hing v. US*, and *Brown v. US*, 11 CCA 329, 331, 403, it was held that imported medicinal preparations containing alcohol and other ingredients were not taxable under the Revenue Act of 1918 as "distilled spirits"; and, in *Rosenbloom v. US*, 13 CCA 63, Fernet Branca bitters, a spirituous beverage containing distilled spirits as its component part of chief value, were held not to be taxable under the provision in the Revenue Act of 1917 for "distilled spirits . . . produced in or imported into the United States." Therefore when Congress enacted the Liquor Taxing Act of 1934, amending section 600 of the Revenue Act of 1918 so as to require taxation of imported "distilled spirits" at $2 per proof gallon, it was presumptively aware of the decisions cited above. Consequently it should not now be assumed that Congress intended to treat as "distilled spirits" articles of the class which in said decisions had been held not to be "distilled spirits."

c) *Basis of court's decision:* In respect to petitioner's contention that the term "dilutions and mixtures" (RS 3248) was never intended to apply to anything except such dilutions and mixtures as are direct products of the distillation process as carried on in this country, the court below said (R 51, emphasis added):

> . . . Even if that were regarded as the true situation up to the enactment of the internal revenue laws affecting imported distilled spirits (acts of 1917-1919 and 1934) it would not change the conclusion here. *Our holding is based upon the proposition that Congress,* RS 3248 being in full force and effect when it enacted the internal revenue tax provisions here in controversy, *intended that the new law be read in the light of the definitions then in full force and effect.*

In other words, it was found that, without any change whatever in pertinent statutes, Congress intended the pre-existing statute to be applied to a subject which was not within its original scope. This is contrary to rules of statutory construction outlined heretofore.

The court below also stated in regard to its conclusion as to the scope of RS 3248, that (R. 50):

> . . . Otherwise, it seems unbelievable that Congress, having so often dealt with the question, should not have given a definition of the term "distilled spirits" *in each of the internal revenue acts* which apply to imported distilled spirits.

This of course assumes that when legislating in regard to imported distilled spirits Congress not only intended to tax articles commonly known as such, but intended to tax products such as are here involved, and that by reason of RS 3248 Congress deemed it unnecessary to identify the latter products.

This conclusion is contrary, however, to the clear implications of the fact that actually, when imposing duty upon imported distilled spirits, Congress in RS 2504 (Schedule D) not only provided that "spirits" should be

assessed with a duty of $2 per gallon, but *also* provided separately that "compounds or preparations of which distilled spirits is a component part of chief value" and "cordials, liqueurs . . . and other similar spirituous beverages" should be so taxed. In addition, since the enactment of RS 3248 there have been eight tariff revisions, and in each of these Congress has separately named "cordials," "liqueurs," "spirits," and "compounds or preparations," etc., *even though all these commodities were taxed at the same rate.* Such legislation is clear evidence that during all of those years Congress did not consider that RS 3248 had the scope assigned to it by the court below; for if this were so, the single enumeration "spirits" would have been an adequate description. The tariff provisions referred to appeared in each of the acts enumerated below, in substantially the following language taken from Schedule H, Tariff Act of 1883, 22 Stat. 505:

> Brandy, and other spirits manufactured from grain or other materials and not specially enumerated or provided for in this act, two dollars per proof gallon. . . .
>
> On all compounds or preparations of which distilled spirits are a component part of chief value, not specially enumerated or provided for in this act, there shall be levied a duty not less than that imposed upon distilled spirits.
>
> Cordials, liqueurs, arrack, absinthe, kirschwasser, ratafia, and other spirituous beverages or bitters, containing spirits, and not specially enumerated or provided for in this act, two dollars per proof gallon.

To the same effect see paragraphs 329, 331, and 332, Tariff Act of 1890, 26 Stat. 589; paragraphs 237, 239, and

240, Tariff Act of 1894, 28 Stat. 525; paragraphs 289, 291, and 292, Tariff Act of 1897, 30 Stat. 173; paragraphs 300, 302, and 303, Tariff Act of 1909, 36 Stat. 39, 40; paragraphs 237, 239, and 240, Tariff Act of 1913, 38 Stat. 135-6; also, paragraph 802, Tariff Acts of 1922 and 1930, 42 Stat. 877, and 46 Stat. 639, wherein the above provisions were merged, as follows:

> Par. 802. Brandy and other spirits manufactured or distilled from grain or other materials, cordials, liqueurs, arrack, absinthe, kirschwasser, ratafia, and bitters of all kinds (except angostura bitters, Tariff Act of 1922) containing spirits, and compounds and preparations of which distilled spirits are the component material of chief value and not specially provided for, $5 per proof gallon.

The provisions in these acts for "compounds or preparations of which distilled spirits are a component material of chief value" further demonstrates that Congress did not consider that the definition in RS 3248 related to imported products, for if it did, then such "compounds or preparations" were dutiable as "spirits" and no need existed for the separate enumeration. Therefore, as to all of this legislation, insofar as it related to cordials, liquors, spirituous beverages or compounds or preparations, it must be assumed that Congress did a needless act in providing for such articles, if the conclusion expressed by the court below as to the scope of RS 3248 be accepted.

d) *The scope of RS 3254:* Contrary to the opinion of the trial court (R 37) in regard to the "green menthe," the court below found (R 49) "it unnecessary to consider

the question of the applicability of RS 3254." However, this section will be briefly referred to by petitioner. It reads as follows:

> Sec. 3254. All products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits.

The section originated in the joint resolution of February 5, 1867, secs. 1-2, 14 Stat. 565, and its legislative history clearly shows that it was intended to relate only to the products of domestic distillers. However, as RS 3254 is not of particular interest in respect to the annexed petition, it will not be further discussed except to say that the wording of the section precludes its application to the instant products. The cassis and the cherry cordial are not "products of distillation," but products of infusion; and although the green menthe might possibly be considered as a product of distillation, the section is inapplicable because of its qualification in regard to alcohol "on which the tax imposed by law has not been paid," such alcohol obviously being domestic alcohol and not foreign alcohol.

e) *Pertinency of Jordan v. Roche:* The remaining point in the decision below concerns this court's opinion in *Jordan v. Roche,* 228 US 436, which it is said (R 52) is "pertinent in considering the comprehensiveness of the section" (RS 3248).

In the *Jordan* case it was determined that bay rum containing alcohol and brought into this country from

Puerto Rico was taxable as "distilled spirits" by virtue of the Foraker Act requiring Puerto Rican products to be assessed with a tax "equal to the internal revenue tax imposed in the United States *on like articles of domestic manufacture.*"

After quoting the italicized words this court stated (p. 441) that "upon the quoted words the controversy in this case turns," and the court then discussed in considerable detail the method by which domestic spirits were taxed, this discussion including a reference to RS 3248.

Although the court's conclusion was that the Puerto Rican product was taxable as distilled spirits, the decision is actually a finding that Puerto Rican bay rum was a "like article" to domestic bay rum. Therefore, as the alcohol contained in domestic bay rum was taxed as "spirits," it was held that a like tax was properly imposed upon the Puerto Rican product. Consequently, even though RS 3248 is referred to in that opinion, the decision does not hold that bay rum was within the dilution-and-mixture clause, for that point was not in issue and did not require determination under the Foraker Act.

III) CONCLUSION

Because the decision below incorrectly determined the scope of the Act of July 20, 1868, and is based upon an erroneous conclusion as to congressional intent when codifying this statute in 1874, and as this conclusion is con-

trary to analogous decisions by this court, it is submitted that this petition should be granted.

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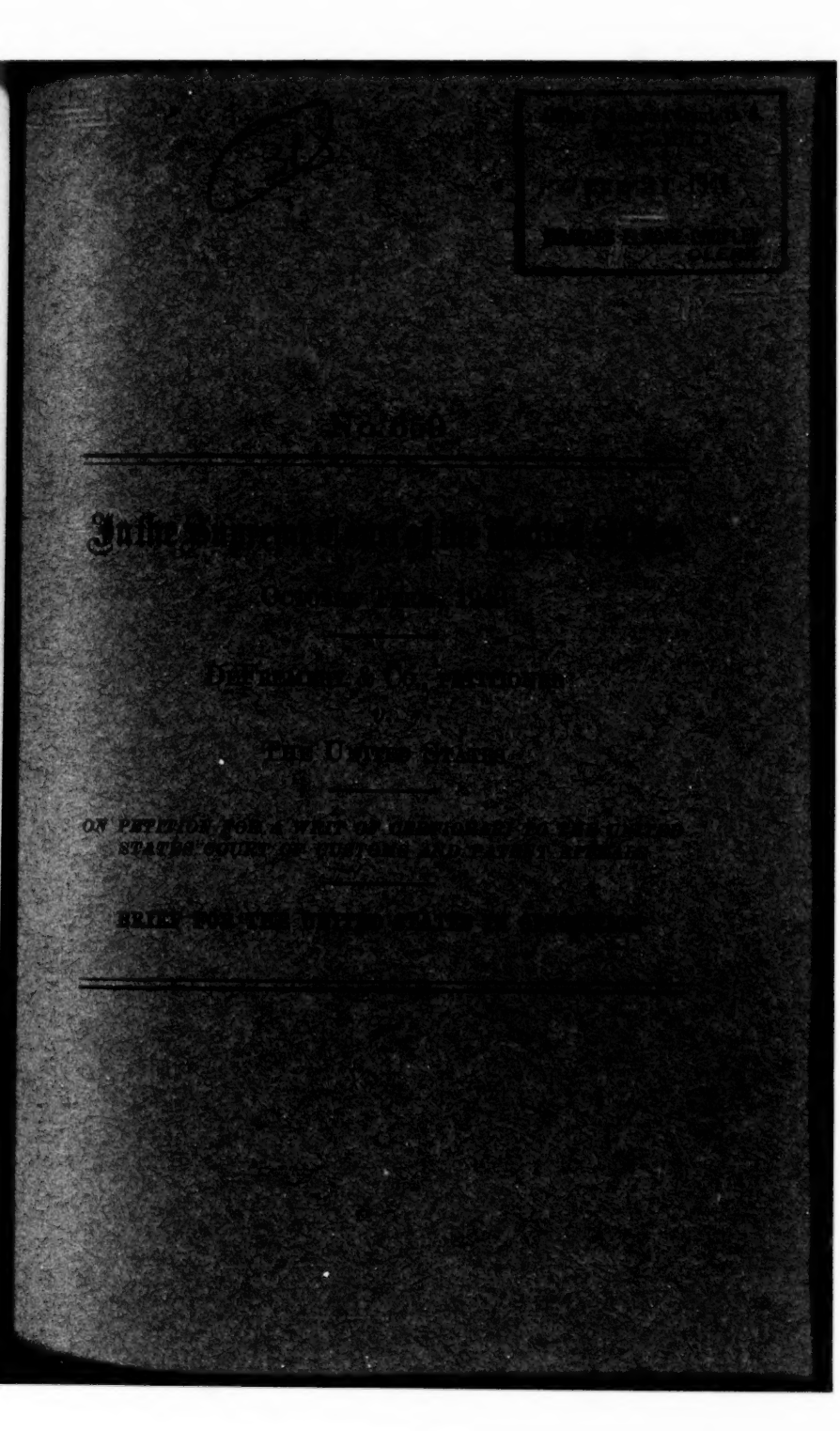

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574363—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 659

DEFREMERY & CO., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the United States Customs Court are reported in 6 Cust. Ct. 167 and 8 Cust. Ct. 113. The opinion of the United States Court of Customs and Patent Appeals is reported in 138 F. (2d) 161.

JURISDICTION

The judgment of the United States Court of Customs and Patent Appeals was entered on June 10, 1943 (R. 53), and petitioner's petition for rehearing was denied on October 4, 1943 (R. 55). On December 29, 1943, by order of the Chief Jus-

tice, the time for filing the petition for certiorari was extended to February 3, 1944 (R. 56). The jurisdiction of this Court is invoked under Section 195 of the Judicial Code as amended (28 U. S. C. 308).

QUESTION PRESENTED

Whether it was proper for the court below to use the definition of the term "distilled spirits" found in Section 3248 of the Revised Statutes as a basis for its determination that certain imported alcoholic beverages were "distilled spirits" within the meaning of that term as used in Section 600 (a) of the Revenue Act of 1918, as amended.

STATUTES INVOLVED

The relevant provisions of the statutes involved are set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

In 1937, at the port of San Francisco, California, petitioner imported from France certain quantities of cassis, green menthe, and cherry cordial. These alcoholic beverages were classified for customs duty purposes as cordials under paragraph 802 of the Tariff Act of 1930 (*infra,* p. 12), as modified by the French Trade Agreement, and assessed with duty at $2.50 per gallon.[1] They were also assessed with an internal revenue tax

[1] The French Trade Agreement changed the rate of duty on cordials from $5.00 per gallon to $2.50 per gallon. 53 Stat. 2236, 2274.

of $2.00 per gallon under Section 600 (a) of the Revenue Act of 1918 (*infra,* pp. 11–12), as amended by Section 2 of the Liquor Taxing Act of 1934 (*infra,* p. 12).

Petitioner filed a protest proceeding against the assessment of the customs duties on the cassis, contending that the cassis was not a cordial and not dutiable as such, and against the assessment of the internal revenue taxes on all of the imported beverages, contending, *inter alia,* that they were not "distilled spirits" within the meaning of that term as used in Section 600 (a) of the Revenue Act of 1918, as amended, and not, therefore, taxable under that Section (R. 5, 7).

At the trial of the case, it was shown by evidence that the cassis was made by placing black currants in alcohol for fifty or sixty days and mixing the juice thus obtained with sugar; that the green menthe was made by distilling mint plant mixed with wine alcohol and mixing the middle of the run with sugar syrup; and that the cherry cordial was made by placing fresh cherries in alcohol for about sixty days and mixing the resultant juice with wine alcohol and sugar syrup. It was also shown that the alcoholic content by volume of the beverages was as follows: cassis 15%; green menthe 30%; cherry cordial 32%. (R. 28–29.)

The trial court overruled the protest in all respects upon all of the merchandise (R. 31–37).

Upon appeal, the Court of Customs and Patent Appeals reversed the judgment of the trial court with respect to its holding that the cassis was a cordial for customs duty purposes but sustained the judgment of the trial court with respect to its holding that all of the beverages were "distilled spirits" within the meaning of that term as used in Section 600 (a) of the Revenue Act of 1918, as amended, and taxable thereunder (R. 39–53).[2]

ARGUMENT

Congress, when enacting the Revised Statutes, laid down in Section 3248 thereof a definition[3] clearly intended to govern the use of the term "distilled spirits" in the chapter in which Section 3248 was placed, that chapter encompassing a comprehensive system for the imposition of internal revenue taxes on alcoholic liquors, which system was restricted at that time to alcoholic liquors of domestic production. However, when enacting the

[2] Petitioner has limited the scope of its petition to the question whether the beverages were upon importation taxable as "distilled spirits" under the Revenue Act of 1918, as amended (Pet. 2).

[3] The definition, which was made sufficiently broad to include "dilutions and mixtures," reads:

"Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, *including all dilutions and mixtures of this substance*". [Italics supplied.]

Revenue Act of 1918, Section 600 (a) of which was a part of a general system for taxing alcoholic liquors, Congress enlarged the general system for taxing such liquors by imposing the tax on imported liquors as well as on domestic liquors. In the 1918 Act, Congress did not define "distilled spirits."

The court below was of the opinion that the beverages involved were "dilutions and mixtures" of alcohol; that they fell squarely within the definition of "distilled spirits" in Section 3248; and that Congress, when enacting the Revenue Act of 1918, as amended, intended that the definition of "distilled spirits" in Section 3248 should apply to that term as used in the later enactments (R. 45–53) In view of its conclusion, the court found it unnecessary to consider whether the beverages fell within Section 3254 of the Revised Statutes (*infra,* p. 11).

The holding of the court below finds ample support in the decisions of this Court. Section 3248 of the Revised Statutes and Section 600 (a) of the Revenue Act of 1918, as amended, are clearly in *pari materia.* And it has long been established by this Court that two or more Acts of Congress, which form a comprehensive system for raising revenue, are in *pari materia,* and that they are to be read together unless the language used plainly requires otherwise. *Stuart* v. *Maxwell,* 16 How. 150, 160–163; *United States* v. *Jef-*

ferson Electric Co., 291 U. S. 386, 396. Where two Acts are in *pari materia,* and the same word is used in both, and a special meaning is given to the word in the first Act, it will be presumed that it was intended that the word should receive the same interpretation in the later Act, nothing appearing to show a contrary intention. *Reiche* v. *Smythe,* 13 Wall. 162, 165.

The decision in *Stuart* v. *Maxwell, supra,* well illustrates the above principle. That case involved two tariff Acts, one passed in 1842 and the other in 1846. The 1842 Act contained a general provision to the effect that on articles manufactured from two or more materials, the duty should be assessed at the highest rates at which any of its component parts might be chargeable. The 1846 Act imposed a duty of twenty percent on unenumerated articles and a duty of twenty-five percent on manufactures of cotton. The question presented was whether certain unenumerated articles manufactured of cotton and linen should be dutiable at twenty percent as unenumerated articles or at twenty-five percent as manufactures of cotton due to the provision in the 1842 Act that an article should be dutiable at the highest rate applicable to any of its component parts. In holding that the Acts must be read together, the Court said (16 How. at 159, 162):

> The act of 1846 is a revenue law of the United States, and must be construed with

reference to acts in *pari materia,* of which it forms only one part. This observance of a settled principle for the construction of statutes is absolutely necessary in the present state of the legislation of Congress on the subject of revenue. Without it, the public revenue could not be collected, and inextricable embarrassments and difficulties must constantly occur. We are obliged to look at the whole existing system, and consider the nature of the subject-matter of the enactment under consideration, in its relations to that system, in order to pronounce with safety upon its repugnancy to, or consistency with, any particular act of Congress.

* * * * *

* * * when Congress, by the act of 1846, merely changed the rates of duty, without legislating concerning their collection, the laws in force on that subject are to be applied; and this application is not restrained by the fact, that, when reenacted by the act of 1842, they were declared to be so for the purpose of collecting the duties by that act imposed. The new duties merely take the place of the old, and are to be acted on by existing laws as the former duties were acted on; and among these existing laws is *that which affords a rule of denomination, so to speak; which determines under what designation in certain cases a manufacture shall come, and how it shall be ranked;* when this has been

determined, the act of 1846 levies the duty. [Italics supplied.]

Petitioner contends (Pet. 10, 16–17) that since internal revenue taxes were not imposed on imported alcoholic beverages at the time of the enactment of the Act of July 20, 1868 (15 Stat. 126), whence Section 3248 of the Revised Statutes was derived, the definition of the term "distilled spirits" contained in that Section could not have been intended to apply to imported distilled spirits, and that the application of the definition by the court below to the imported beverages gave to the Section a broader scope than it originally possessed and was, therefore, in conflict with the rule of construction that a codified statute is no broader than its antecedent.

It is obvious that the rule contended for by petitioner is inapplicable to this case, for there is nothing in the language of Section 3248 to prevent the application of the definition of distilled spirits contained therein to imported alcoholic beverages. Accordingly, the intention of Congress when it enacted the Revenue Act of 1918 is the important point, rather than its intention when it passed Section 3248 of the Revised Statutes or its antecedent. The two statutes being in *pari materia,* it is proper to read them together as an aid in ascertaining the meaning which Congress intended to give to the term "distilled spirits" which it employed in Section 600 (a) of

the Revenue Act of 1918 and, in this case, to apply that definition of distilled spirits to the imported alcoholic beverages in order to determine their taxability. It will be observed that to construe the term "distilled spirits" in Section 600 (a) otherwise would require that two separate and distinct meanings be given to the same words in the same Section of the statute, one meaning for domestic distilled spirits and another for imported distilled spirits. Thus, the definition in Section 3248 being broader than the common meaning of the term "distilled spirits," some of the imported products would escape taxation entirely, while identical domestic products would be required to bear the tax. To impute to Congress an intention to bring about the above results would seem to be highly improper. The same results would flow from the application of the petitioner's contention that the words "dilutions and mixtures" contained in the definition cover only such dilutions and mixtures as occur in the process of distillation when carried on in this country. Also, as the court below recognized, the opinion in *Jordan* v. *Roche,* 228 U. S. 436, 443–444, clearly indicates that those words should not be given the narrow meaning contended for by the petitioner.

Petitioner's references to the various tariff Acts and cases decided thereunder (Pet. 13, 19, 21–22) to show that Congress has recognized a difference

between cordials and distilled spirits are not in point. In the tariff system, Congress made a distinction between cordials and distilled spirits for classification purposes. In the internal revenue system, it made no such distinction. It is significant, however, that in the tariff system Congress imposed the same rate of duty on both. See Section 802, Tariff Act of 1930 (*infra,* p. 12).

The internal revenue laws of the United States have been enacted into a comprehensive code, in which a definition of the term "distilled spirits" and a provision for taxing imported distilled spirits have been reenacted in the same Act. See Sections 2800 (a) (1) and 2809 (b), Internal Revenue Code (53 Stat. 298, 307). Under the circumstances, the question does not appear to be one likely to call for future consideration.

CONCLUSION

The decision of the court below is clearly correct and presents no question of general importance. There is no conflict of decisions. The petition should be denied.

Respectfully submitted.

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FEBRUARY 1944.

APPENDIX

Revised Statutes of the United States:

> SEC. 3248. Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.
>
> SEC. 3254. All products of distillation, by whatever name known, which contain distilled spirits or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits.

Revenue Act of 1918, 40 Stat. 1057, 1105:

> SEC. 600. (a) That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on

each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law.

Liquor Taxing Act of 1934, 48 Stat. 313:

SEC. 2. Paragraphs (3) and (4) of subdivision (a) of section 600 of the Revenue Act of 1918, as amended (relating to the tax on distilled spirits generally and the tax on distilled spirits diverted for beverage purposes) [U. S. C., Sup. VI, title 26, sec. 1150 (a) (1) and (2)], are amended to read as follows:

"(3) On and after January 1, 1928, and until the effective date of Title I of the Liquor Taxing Act of 1934, $1.10 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon; and

"(4) On and after the effective date of Title I of the Liquor Taxing Act of 1934, $2.00 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon."

Tariff Act of 1930, 46 Stat. 590, 639:

PAR. 802. Brandy and other spirits manufactured or distilled from grain or other materials, cordials, liqueurs, arrack, absinthe, kirschwasser, ratafia, and bitters of all kinds containing spirits, and compounds and preparations of which distilled spirits are the component material of chief value and not specially provided for, $5 per proof gallon.

U. S. GOVERNMENT PRINTING OFFICE: 1944

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